

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000142-001 DT

11/06/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA

DOUGLAS W JANN

v.

SCOTT EDWARD LAWLESS (001)

TODD K COOLIDGE

PHX JUSTICE CT-E1
REMAND DESK-LCA-CCC

MINUTE ENTRY

EAST PHOENIX #1 JUSTICE COURT

Cit. No. #TR00-16420 CR

Charge: 1. DUI-LIQUOR/DRUGS/VAPORS/COMBO
2. DUI W/BAC OF .08 OR MORE

DOB: 12/13/59

DOC: 08/13/99

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and the court has considered and reviewed the record of the proceedings from the trial court, exhibits made of record and the memoranda submitted.

On August 13, 1999, Appellant, Scott Edward Lawless, was pulled over by Arizona DPS Officer Steve Mitchell, for an alleged civil traffic violation. A DUI investigation followed and

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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Appellant was arrested and charged with two counts of DUI.¹ On January 13, 2003, the case was resolved by way of a jury trial and Appellant was found guilty of both counts, each a Class 1 misdemeanor. There was a subsequent trial to the bench concerning the matter of Appellant's prior DUI conviction, which the trial judge found to be proven beyond a reasonable doubt. Appellant was sentenced to thirty (30) days in jail and ordered to pay an \$885.00 fine.

During the trial, the State called Officer Mitchell to the stand. While being questioned on cross-examination, Appellant's attorney asked Officer Mitchell if he knew what type of cocktails Appellant has been drinking, and Officer Mitchell responded, "He refused to answer questions." At this point, Appellant's attorney asked to approach the bench and moved for a mistrial based on Officer Mitchell's commenting on Appellant's right to remain silent. An in-chambers discussion ensued. The court denied Appellant's motion, finding that Officer Mitchell's comments regarding Appellant's 5th Amendment right were unintentional.

At the bench trial on Appellant's prior DUI conviction, the State called a latent print examiner, Robert Tavernaro, to testify concerning his duties and qualifications for the position. Mr. Tavernaro thoroughly explained the finger print identification process. Mr. Tavernaro was given a known print of Appellant's and compared them to a set of Appellant's prints taken in court the day of trial. Mr. Tavernaro was then questioned by Appellant's attorney as to the basis of his comparison of the two sets of prints. Mr. Tavernaro answered the questions, explaining the criteria upon which a comparison is based. Appellant objected to the admission of Mr. Tavernaro's testimony, asserting that it lacked conclusive information and proper foundation. The court overruled Appellant's objection and found that the State provided sufficient evidence to support the allegation of the prior DUI conviction. Appellant now brings the matter before this court, having filed a timely Notice of Appeal.

The first issue is whether the trial judge erred in denying Appellant's Motion for Mistrial. Appellant argues that Officer Mitchell's comment that Appellant "refused to answer questions" constitutes fundamental error, and that the court's curative instruction was insufficient. Appellant argues that the only appropriate remedy is a mistrial. Appellant cites State v. Sorrell² as a mandatory and dispositive authority on the issue at hand. However, in Sorrell,³ it was a *prosecutor's deliberate* comments on the defendant's right to remain silent that the court deemed as fundamental and reversible error. Here, it was not a prosecutor making the statements, but a witness. More importantly, the witness answered the question in response to a question from Appellant's attorney. Presumably, Appellant's trial attorney knew that his client had invoked his right to remain silent, and should have crafted his question to the officer in a narrow fashion to avoid mention of the Appellant's invocation of a right.

¹ Violations of A.R.S. §1381(A)(1) and A.R.S. §1381(A)(2).

² 132 Ariz. 328, 645 P.2d 1242 (Ariz. 1982).

³ *Id.*

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000142-001 DT

11/06/2003

Reversal is required where a fundamental error prejudices a defendant,⁴ but even fundamental errors need not be reversed when there is substantial evidence in the record to support the verdict and it can be said that the error did not, beyond a reasonable doubt, contribute significantly to the verdict.⁵ This is the harmless error doctrine approved by the United States Supreme Court in Chapman v. California⁶ and Harrington v. California.⁷ In Sorrell, the court addressed the harmless error doctrine as it dealt with the deliberate comments of the prosecutor:

The harmless error doctrine is an appellate court doctrine to be applied when fundamental error has been committed in the trial court, and the error, though fundamental, is harmless beyond a reasonable doubt. Appellate courts, however, are reluctant to apply the harmless error doctrine when it appears that the error was deliberate and willful. In the instant case, while the comment of the Sheriff's Deputy may have been inadvertent, the comments by the prosecutor were deliberate and not inadvertent. From an examination of the entire record, we conclude that it cannot be said beyond a reasonable doubt that the prosecutor's misconduct did not contribute to the verdict.⁸

After a careful review of the record, I find substantial evidence to support the verdict and concluded that the witness' comments did not, beyond a reasonable doubt, contribute significantly to the verdict. Further, nothing suggests that the comments were deliberate. To the contrary, I find that the comments were responsive to the question asked by Appellant's attorney.

The second assertion by Appellant is that the lower court erred in finding Appellant guilty on the prior conviction due to insufficient evidence to support the finger print identification. This issue directly concerns the sufficiency of the evidence offered at the lower court. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.⁹ All evidence will be viewed in a light most favorable to sustaining a judgment and all reasonable inferences will be resolved against the Appellant.¹⁰ If conflicts in evidence exist, the appellate court must resolve such conflicts in favor of sustaining the judgment and against the Appellant.¹¹

⁴ State v. Anderson, 110 Ariz. 238, 517 P.2d 508 (1973).

⁵ State v. Thomas, 130 Ariz. 432, 636 P.2d 1214 (1981).

⁶ 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)

⁷ 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

⁸ Sorrell, 132 Ariz. at 330, 645 P.2d at 1244.

⁹ State v. Guerra, 161 Ariz. 289, 778 P.2d 1185 (1989); State v. Mincey, 141 Ariz. 425, 687 P.2d 1180, cert. denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); State v. Brown, 125 Ariz. 160, 608 P.2d 299 (1980); Hollis v. Industrial Commission, 94 Ariz. 113, 382 P.2d 226 (1963).

¹⁰ Guerra, supra; State v. Tison, 129 Ariz. 546, 633 P.2d 355 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

¹¹ Guerra, supra; State v. Girdler, 138 Ariz. 482, 675 P.2d 1301 (1983), cert. denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.¹² When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.¹³ The Arizona Supreme Court has explained in State v. Tison¹⁴ that "substantial evidence" means:

More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.¹⁵

The record is replete with evidence supporting the finger print identification. The State's expert witness, a latent print examiner, testified that while the known prints were "not an optimal copy," they were "useable and identifiable."¹⁶ He further testified that he can do latent print identification alone and that the absence of a second opinion, or "verification," does not negate the validity of an identification. The expert witness made it clear that the fingerprints were the same and belonged to Appellant.

IT IS THEREFORE ORDERED affirming the findings of guilt and sentences imposed by the East Phoenix #1 Justice Court.

IT IS FURTHER ORDERED remanding this matter back to the East Phoenix #1 Justice Court for all further, if any, and future proceedings.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

¹² In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062; Ryder v. Leach, 3 Ariz. 129, 77P. 490 (1889).

¹³ Hutcherson v. City of Phoenix, 192 Ariz. 51, 961 P.2d 449 (1998); State v. Guerra, supra; State ex rel. Herman v. Schaffer, 110 Ariz. 91, 515 P.2d 593 (1973).

¹⁴ SUPRA.

¹⁵ Guerra at 553, 633 P.2d at 362.

¹⁶ Transcript p. 15, ll. 5-6.